IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

PAUL GIBBS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Mine Workers of America (called "UMW" herein), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit,[1] entered April 6, 1965, in Case No. 15,624, styled Paul Gibbs, Plaintiff-Appellee v. United Mine Workers of America, De-

[1] Called "Sixth Circuit" herein.

fendant-Appellant, affirming a judgment entered August 28, 1963, by the United States District Court for the Eastern District of Tennessee, Southern Division,[2] against UMW in Gibbs' favor for $75,000 and costs (59-60a).[3]

A certified appendix record in said case, with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A to this Petition (pp. A. 1a-17a); and in the certified appendix record. The opinion is not officially reported but is unofficially reported in 51 CCH Labor Cases 19,623.

The District Court's opinion on UMW's motion to dismiss and on UMW's motion for judgment NOV appear in Appendix A to this Petition at pp. A. 19a-24a and pp. A. 24a-40a); and in the certified appendix record at pp. 24-30a and pp. 42-58a). The opinion on the motion to dismiss is not reported. The opinion on UMW's motion for judgment NOV is reported at 220 F.Supp. 871 and is also reported at 48 CCH Labor Cases 18,473 and 54 Labor Relations Reference Manual 2080.

JURISDICTION

The Sixth Circuit's judgment, for which complaint is herein made, was entered April 6, 1965. This Court's jurisdiction is invoked under 28 USCA § 1254(1) and 2101(c).

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[2] Called "District Court" herein.

[3] Page references are to the certified Appendix Record filed in this Court's Clerk's office under Rule 21. References to the Appendix to this Petition are indicated by the symbol "A".

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The jurisdiction of the District Court was based upon Section 303 of the Labor Management Relations Act, 1947, as amended,[4] (29 USCA 187) and upon the theory of pendent jurisdiction under which it was found that the District Court had jurisdiction to determine Gibbs' alleged state law cause of action for wrongful interference with his contractual rights.

QUESTIONS PRESENTED

1. Where a parent union assumes the direction of picketing theretofore commenced by a local union and insists upon and achieves order, is the parent union liable under state law for violence committed prior to the parent union's involvement?

2. Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was "calculated to influence the size of a favorable verdict (for the plaintiff) without affecting the determination on the merits"?

3. In an action for damages against a labor union in which plaintiff alleged that acts which occurred during a labor dispute constituted a violation of Section 303 of the Act and a violation of state law, did the District Court have pendent jurisdiction of the non-federal claim?

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[4] Herein called "Act."

4. Where a verdict of damages is based upon a finding of liability under Section 303 of the Act and state common law and where damages recoverable under the two theories are not necessarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?

STATUTES INVOLVED

The statutory provisions involved are Section 6, Norris-LaGuardia Act (29 USCA 106); the Labor Management Relations Act, 1947 [29 USCA 158(a)(2), 158(b)(4) and 187]. These statutory provisions are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Kind of Action and The Judgment

Paul Gibbs, a coal company superintendent and also an independent contractor trucking coal for the company, sued UMW for damages he allegedly sustained in each capacity, charging a violation of Section 303 and state law in a 1960 dispute (14-14a, 23a, 30a). UMW moved to dismiss on jurisdictional grounds (20a, 23a), but its motion was overruled (24-30a). UMW then answered (15-17a), and the case was tried to a jury on special issues. The jury found UMW had violated *both* Section 303 and state law and that Gibbs had sustained compensatory damages of $60,000.00 as a supervisor and $14,500.00 as an independent trucker. The jury also awarded $100,000.00 in punitive damages (32-34a).

Upon consideration of UMW's motion for judgment NOV or for a new trial (34-41a) the District Court held that Gibbs could not recover under Section 303 for his claim as a supervisor, as a matter of law; that it had pendent jurisdiction of the state law claim; that evidence sustained the verdict of liability under state law, and, with respect to Gibbs' claim as a trucker, under Section 303; but that there was no evidence to sustain the verdict of $14,500.00 in damages to Gibbs as an independent trucker. The District Court also found the jury argument of plaintiff's counsel was improper but that it could be cured by a remittitur. A remittitur of $30,000.00 was suggested with regard to damages claimed by Gibbs as a supervisor and of $55,000.00 in the award of punitive damages (42-58a). The suggested remittitur was accepted and judgment was entered for a total of $75,000.00 (59-60a).

Upon appeal the Sixth Circuit affirmed the judgment as entered. (p. A. 18a) The substance of the Sixth Circuit's opinion is discussed below (pp. 8-11, *infra*).

STATEMENT OF FACTS

For many years Tennessee Consolidated Coal Company ("Consolidated") operated a major coal mine ("Coal Valley") in Southern Tennessee under union contracts with UMW. Effective in March of 1960 Consolidated cancelled its union contract and its employees, members of UMW Local 5881, refused to work (90-96a, 319a). In the summer of 1960 Consolidated organized a wholly owned subsidiary, Grundy Mining Company ("Grundy"), to open and operate a number of small mines on its Grays Creek coal lands near the Coal Valley Mine, to supply coal on Consolidated's contracts (193-195a).

At that time Gibbs was operating a small mine in the area under UMW contract, and was also engaged in the business of trucking coal. Prior to the incidents described below he had no business relationship with Consolidated or Grundy (89-94a, 135-139a).

On August 12, 1960, Gibbs was employed by Grundy to superintend the opening of the Gray's Creek mines. He was also employed as an independent contractor to truck the coal to be mined. Gibbs was told that employees would be hired and would meet him at Gray's Creek on the following Monday, August 15, 1960. He understood that UMW members who had worked at Consolidated's Coal Valley mine would not be employed. Following Gibbs' employment, Grundy, with the assistance of the Southern Labor Union, began to recruit employees (92-100a, 141-143a, 175a, 179a, 183a, 185a).

These developments were unknown to UMW and its members. On Saturday, August 13, however, news that mining was to commence at Grays Creek reached the Coal Valley miners. UMW Local 5881 called a meeting of its members for Sunday, August 14, at which the subject was discussed. No representative of either the International Union or District 19 attended or was notified of the meeting. George Gilbert, District 19's area representative, was absent from the area from Saturday, August 13, until the following Tuesday night, August 16, attending a meeting at District 19's headquarters in Middlesboro, Kentucky (326-328a, 337a, 350-352a, 395a, 416-417a, 430-431a, 457a).

On Monday, August 15, Gibbs went to the proposed mine site. Three members of Local 5881 also went there and talked to Gibbs. Gibbs soon left though he had had

no argument or disagreement with these men. Later, while Gibbs was not present, some of the recruited employees came to the mine site. They testified they were stopped from "going in" by "four to eight men", some of whom were armed (99-101a, 151a, 395-398a, 417-418a).

On August 16 a large number of Coal Valley miners were present at the Grays Creek entrance. A few of the recruited employees came but were forceably persuaded to leave (164-167a, 172-174a, 181-182a). Later Gibbs came and was threatened, though not harmed, by the miners. Johnny Cain, the Southern Labor Union organizer who had aided Grundy in the recruitment, also came and was beaten up (103-109a, 140-141a, 152-154a, 441-444a, 458-459a).

News of the effort to open mines in Grays Creek (though not of the disturbance) was telephoned to a District 19 official in Middlesboro on Tuesday morning, August 16. He gave the information to District Representative Gilbert with instructions to investigate and report back, to keep the pickets few in number if there was picketing, and to make certain the picketing did not result in the shut down of other area mines. Gilbert returned to his home near the mine that afternoon (298-301a, 310-311a, 327-329a, 337a, 352-353a, 472-473a).

After his return Gilbert instructed the men to limit their pickets to three and maintain order (332-334a, 408-409a, 424-433a, 461-462a). Other District officials were sent to the area to keep down the trouble (473-477a). The evidence is positive that after Gilbert's return, there was no disturbance of any kind on the picket line. At the instructions of Gilbert the pickets were limited to three (384a, 405-406a, 424-425a, 433-434a, 444a).

The picketing was in protest of the effort of Consolidated through its subsidiary, Grundy, to replace in effect, its long time employees with persons specially recruited by a rival union. The Coal Valley miners had been promised by Consolidated officials that their next work was to have been in Grays Creek (435a-445a, 460-461a, 384a, 387a, 394a, 402a, 437a, 475-477a). The picketing continued through May, 1961, when the old Coal Valley mine was reopened under a UMW contract. Grundy, meanwhile, had made no further effort to open mines in Grays Creek (237-239a, 305-307a, 332-333a, 382-383a, 473-474a).

Additional aspects of the evidence are discussed in the following section of this petition.

THE DECISION OF THE COURT OF APPEALS

The four issues material to this petition were decided by the Sixth Circuit as follows:

(1) It found the District Court properly applied the doctrine of pendent jurdisdiction

In so doing the Sixth Circuit continued to apply a rule it has found applicable in a number of cases involving the present petitioner in which substantial judgments under state law have been sustained.

In the instant case the Court stated that two requirements must be met in order to sustain the exercise of jurisdiction by a federal court over a state law claim wherein a complaint recovery is sought under Section 303 and state law: (a) The federal questions presented by plaintiff's pleadings and proofs must not be "plainly unsubstantial"; and (b) the same conduct (or at least substantially the same conduct) must be claimed as the basis for the claim under both federal and state law.

The Sixth Circuit found both requirements satisfied. UMW contended that the picketing at the Grundy mine was clearly primary and hence outside the scope of Section 303. Gibbs contended, however, that the purpose of the picketing was to force Grundy to cease doing business with him both as a superintendent and as an independent trucker. Without commenting on the *admitted facts* that UMW or its members were without knowledge of Gibbs' trucking contract at the time and thus *could not have had* the intention attributed to them by Gibbs; and that Gibbs at no time sought to commence performance of his trucking contract and UMW had no dispute with Gibbs as a coal operator or as a trucking contractor, and without discussing this Court's definitive rejection in *United Steelworkers* v. *NLRB,* 376 U.S. 492, of Section 303's application in a comparable situation, the Sixth Circuit held that Gibbs' contention relative to UMW's purpose was not "plainly unsubstantial".[5]

(2) It found the violence of August 16 attributable to UMW and, therefore, that Gibbs' claim under state law was not preempted.

Here the Sixth Circuit held there was evidence from which the jury could infer that UMW agents "had a hand in planning and carrying out the original vio-

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[5] On the authority of *Seeley* v. *Brotherhood of Painters,* etc., 308 F.2d 52 (CA 5, 1962), the District Court found, as a matter of law, that a superintendent could not claim that primary picketing of his employer constituted a Section 303 violation as to him. It was thus the implication of the District Court that the substantial federal question had to be found, if at all, with regard to Gibb's claim as an independent trucker (54a).

lence".* *Significantly,* however, it held preemption would not preclude state law application—presumably notwithstanding UMW's successful efforts to maintain an orderly picket line—on the theory that its exercise of control over the pickets after the violence ratified the prior violence and made secure "the fruits" of the initial success of the violence. UMW's admitted involvement subsequent to the violence, the Court concluded, brought the case within the exception to the preemption principal announced in *UAW* v. *Russell,*

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* The inference that UMW was involved in the original violence could be drawn, the Sixth Circuit suggested, from statements attributed to District Representative Gilbert, such as the following: "Paul (Gibbs) was trying to bring the other union in there and he (Gilbert) said he aint going to get by with it." (218-219a).

The Court also pointed to testimony of Gibbs with regard to the identification of union men who were present at Grays Creek on August 15 or 16. Gibbs testified (126a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know". Gibbs also said "he (Gilbert) didn't play any part that I seen". Gibbs' testimony is insufficient in law to warrant a verdict based on Gilbert's presence, even disregarding positive contrary evidence and Gilbert's inconsistent pre-trial deposition (479a). Evidence must in itself have fitness to induce conviction, even if uncontradicted. *Standard Oil Co.* v. *Roach,* 21 Tenn. App. 661, 665. Thus, in *May* v. *Railroad,* 129 Tenn. 521, where a witness testified that an incident occurred September 12, according to her best recollection, but she could not be certain, the Tennessee Supreme Court held "there was no evidence to sustain the verdict because . . . the plaintiff was unable to state the date (a pivotal point in the case) any more definitely that it was either on the 12th or near that date".

It is significant that this testimony was not relied upon by the District Court nor by Gibbs in the Court of Appeals and was not discussed in briefs or argument. Indeed, in Gibbs' Main Brief in the Sixth Circuit this admittedly vague recollection or impression was tacitly abandoned with the statement that "undisputably it appears that Gilbert . . . went to Middlesboro . . ." (Gibbs' Main Brief, p. 61).

356 U.S. 634, even if UMW was not the author of the original violence.

(3) It found counsel's appeal to prejudice could be cured by remittitur

In considering this aspect of the Sixth Circuit's decision it is necessary to examine the jury argument of Gibbs' counsel (481-493a). It is replete with assertions calculated to arouse every conceivable prejudice against UMW. It was elaborately asserted that UMW was utterly without respect for the law; that UMW is heartless and cares not that innocent people starve; that its very defense in this case was a scheme to "bludgeon" Gibbs; that it is the "bugger" responsible for poverty in the coal field; and much more. For example, in a case without mention of property destruction, counsel argued (491-492a) ". . . they want you to be light on them so they can pay it back and go over there *and blow up another mine.*"

The Sixth Circuit acknowledged in its opinion that where "an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error", citing several cases including *Minneapolis, St.P.&SSMRy.* v. *Moquin*, 283 U.S. 520, and *National Surety Co.* v. *Jean*, 61 F.2d 197 (CA 6, 1932).

It held, however, in agreement with the District Court, that counsel's remarks were such as to be "within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits." It thus found the case in a "traditional area when a remittitur may be employed to avoid an excessive verdict . . ."

(4) It pretermitted UMW's contention that the verdict for damages, which was based upon two theories, could not be sustained where it was subsequently determined that one theory was erroneous

REASONS FOR GRANTING THE WRIT

Question One

The Sixth Circuit's decision improperly implements the doctrine of federal preemption and, as such, conflicts with decisions of this Court, including *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957), *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964). Moreover, its finding that UMW was liable in damages because it "ratified" prior violent conduct and because it received the "fruits" thereof by reason of its subsequent direction of nonviolent picketing, also conflicts with *Rainfair* and with *UMW* v. *Coronado Coal Company*, 259 U.S. 344.

The question is of obvious importance to organized labor and to national labor policy. A cornerstone of that policy is responsible unionism but it does not and should not extend to impose liability for unauthorized acts of non-agents. Nor should it be extended, as this decision does, to thwart a union's legitimate efforts to curb excessive conduct on the part of those it is the union's duty to represent.

In the instant case UMW, as the Sixth Circuit alternatively viewed the evidence,[7] was faced with the choice of abandoning its members or of restoring order. It did the latter, and from that point on no violence

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[7] We believe the conclusion that UMW is legally responsible for the violence of August 16 must stand or fall on the Sixth Circuit's finding that UMW "adopted" the violence and secured the "fruits" thereof. Its finding of evidence that Gilbert was present at the time cannot stand for the reasons expressed in footnote 6, *ante* p. 10. Furthermore, this conclusion is clearly offensive to the "clear proof" requirement of the Norris-LaGuardia Act's Section 6, 29 USC 106.

occurred. Obviously UMW could not erase what had transpired. This does not mean, however, that by restoring order it "secured the fruits" of or "ratified" the prior violence. Under analogous circumstances the Fifth Circuit held this "does not of itself amount to ratification", *NLRB* v. *Mayer,* 196 F.2d 286 (CA 5, 1952).

To impose liability on the parent union in these circumstances is to require that a union forego its right to picket in an orderly way because of the prior violence of members, or to permit picketing only on penalty of damages under state law.[8] This conclusion conflicts with the *Rainfair* case where it was held that the impact of federal preemption continued notwithstanding the occurrence of disorder in a labor dispute. State law, even in this context, *Rainfair* holds, *may not be applied to enjoin peaceful picketing.* By the same token liability for damages may not be imposed under state law for such conduct. This view, and not that

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[8] The relationship between UMW and the men prior to Gilbert's involvement would not have constituted the men UMW agents, and there is no evidence showing that any of the men were UMW agents. The National Labor Relations Board in *Poinsett Lumber and Mfg. Co.,* 33 LRRM 1101, said, ". . . it is well established that mere advocacy of the [union] by rank-and-file employees does not constitute them agents of the union." In *International Ladies Garment Workers Union* v. *NLRB,* 99 App. D.C. 64, 70, 237 F.2d 545, 551, (1956), the Court held that "Imputation of the acts of one person to another" is forbidden *"except when the one is acting as agent for the other".* Accord: *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (CA 6, 1943). The Fifth Circuit, in *NLRB* v. *Marshall Car Wheel, etc.,* 218 F.2d 409, 417, (CA 5, 1955), rejected a contention that there was an agency relationship "between all strikers, the guilty employees, and the union".

of the Sixth Circuit, comports with the preemption principle of the *Garmon* and *Morton* cases.

We insist that there is nothing in a union's instructions not to engage in violence and not to engage in mass picketing, coupled with the absence thereof, which warrants a finding of "adoption or affirmance . . . of a prior act" as is required to establish ratification. 3 Am. Jur. 2d, Agency, Sec. 160.

UMW had a legitimate reason to involve itself, wholly apart from ratification of the prior violence. Simply to restore order was a sufficient reason. The circumstances under which the company sought to replace UMW members was another. Indeed, the NLRB (though not the Sixth Circuit) sustained UMW's subsequent charge that the coal companies unlawfully assisted Southern Labor Union in their combined efforts to displace UMW members.[9] The doctrine of ratification is therefore inapplicable for "Ratification cannot . . . be inferred from acts which may be readily explained without involving any intention to ratify." 3 Am. Jur. 2d, Agency, Section 170. See also *UMW* v. *Coronado Coal Company,* 259 U.S. 344, *International Ladies Garment Workers* v. *NLRB,* 237 F.2d 545 (CADC, 1956).

The Sixth Circuit's sweeping imposition of liability poses grave questions both of preemption and union responsibility which Court has not had occasion to con-

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[9] UMW charged Tennessee Consolidated with having unlawfully assisted Southern Labor Union in violation of Section 8(a)(2) of the National Labor Relations Act, 29 USC 158(a)(2), in this matter. The NLRB held that Tennessee Consolidated had so violated the Act, 131 NLRB 536, but the Sixth Circuit refused to enforce the Board's order. *NLRB* v. *Tennessee Consolidated Coal Co.,* (CA 6, 1962), 307 F.2d 374.

sider in a comparable context. We submit the question should be settled by this Court.

Question Two

We agree with the District Court and the Sixth Circuit that counsel's appeal to prejudice had a corrosive effect on the jury's verdict. We disagree that its impact was or could be cured by remittitur. We emphatically disagree that the appeal to prejudice was designed to merely enhance the size of the verdict and did not go to the issue of liability. This narrow distinction was neither intended nor achieved, as a reading of counsel's argument and the resulting verdict plainly show (481-493a).

The decision conflicts, by every realistic standard, with that of the Fourth Circuit in *UMW v. Patton,* 211 F.2d 742, 751 (CA 4, 1954). In that case the Court refused to permit a comparable verdict to stand where the inference could "fairly be drawn that the jury may have been influenced in reaching such result by incompetent and prejudicial evidence. . . ."

The conflict is all the more glaring for here it was not merely evidence that achieved the result; it was by a calculated appeal to prejudice in closing argument.

The Sixth Circuit correctly said "that where an excessive verdict results from appeals to passion, prejudice or caprice, a remittitur may not be employed to cure the error." We submit, however, that this legal proposition is devoid of meaning if, as here, its application is to be avoided upon a finding that an appeal to prejudice of the type here involved was merely designed to enlarge the size of the verdict.

This Court is aware that cases of this sort involve one of the most sensitive areas of our economy in which emotion far too often holds sway. In such a case an appeal to prejudice (whatever its purpose) is an especially effective instrument. Its use should be denied —not merely circumscribed—in the most emphatic terms.

The question presented turns on a consideration of fair play and justice. These factors, as well as the noted conflict in decisions, fully warrant the review of this case.

Question Three

Finding that "the federal questions presented by the plaintiff's pleadings and proofs were not 'so plainly unsubstantial' as to destroy federal jurisdiction" and that "the same conduct" constituted the basis for the federal and state claims, the Sixth Circuit held that the doctrine of pendent jurisdiction empowered the District Court to determine the state law claim. UMW submits that this application of the pendent jurisdiction doctrine conflicts with this Court's decisions of *Local 20 Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), and *Hurn* v. *Oursler*, 289 U.S. 238 (1933).

As we view it, this case involves "primary activity" of a singular form. The protest obviously concerned the effort of Grundy Mining Company to replace the UMW members who had worked for its parent corporation for many years. The picketing occurred at the entrance to the proposed Grundy mines. The violence which erupted likewise occurred at the entrance to the mines. Even in Gibbs' capacity as an independent trucker, Gibbs was to perform a part of Grundy's normal work, i.e. the transportation of coal, and hence

under the doctrine of *Local 761 IUE* v. *NLRB,* 366 U.S. 667 (1961), the picketing was secondary as to Gibbs. Moreover, Gibbs could not complain that the violence changed the picketing from a primary to a secondary activity. A contrary conclusion was first reached in *NLRB* v. *International Rice Milling Company,* 341 U.S. 665, (1951), and any lingering doubt was laid to rest by this Court's decision in *United Steelworkers* v. *NLRB,* 376 U.S. 492, (1964).

Other applicable decisions foreclose the possibility that a secondary boycott could exist under the circumstances of this case, as a matter of law. Notable among these decisions is that of *Seeley* v. *Brotherhood of Painters,* 308 F.2d 52, (CA 5, 1962). In this case it was held that primary picketing of an employer could not constitute a secondary boycott as to that employer's supervisor even though the picketing had as its purpose the removal of the supervisor. Moreover, in conflict with the decision of the Sixth Circuit, *Seeley* held that the alleged federal claim did not invest the Court with pendent jurisdiction to determine state claims arising out of the same circumstances.

The decisions cited establish that the federal question posed by the instant case was "plainly unsubstantial". Even, therefore, if the pendent jurisdiction doctrine may be applicable in certain cases, its exercise was error in the instant case under this Court's decision in *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103.[10]

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[10] Gibbs contended that an object of the picketing was to force Grundy Mining Company to cease doing business with Gibbs with respect to his contract of employment and his hauling contract. The jury agreed with this contention, notwithstanding the evidence, detailed above, that the purpose of the picketing was to

Furthermore, it was erorr to find a substantial federal question inasmuch as the UMW members who engaged in picketing were without knowledge of Gibbs' contract as a trucker. Gibbs never undertook to perform on his trucking contract and hence none of his trucking employees were remotely involved in the dispute. In the absence of the involvement of secondary employees it is idle to say that a substantial federal question under Section 303 is posed. And because UMW was without knowledge of Gibbs' trucking contract, it was impossible for UMW to have had the intent or specific objective required in a Section 303 violation. *Local 1976, United Brotherhood of Carpenters* v. *NLRB,* 357 U.S. 93, 98.

Even had a substantial federal question been posed, the facts upon which Gibbs based his claim of secondary boycott as a trucker were necessarily different from those involved in his claim under the common law as a supervisor. Because of the differences in the facts supporting the two claims it was error to apply the pendent jurisdiction doctrine.

Insofar as we are aware the Sixth Circuit is alone in its application of the pendent jurisdiction doctrine in labor cases. This Court reversed the Sixth Circuit's

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protest Grundy's replacement of its longtime coal miners with Southern Labor Union members. In conflict with the jury's conclusion is the decision of the National Labor Relations Board on charges against UMW's Local 5881, growing out of this same dispute, 130 NLRB 1181. In any event, it is beyond any doubt that both Gibbs and Grundy had the situs of their work at the Grundy mine. Picketing at that location therefore, under the Board's long-accepted standards, would not constitute a proscribed secondary boycott. *Sailors' Union of the Pacific* (*Moore Dry Dock Co.),* 92 NLRB 547. See also a discussion of Board opinions in *Local Union 761, IUE* v. *NLRB,* 366 U.S. 667.

application of that doctrine in the *Morton* case in which non-violent picketing was involved. It is significant also that the Fifth Circiut rejected its use in the *Seeley* case, *supra,* as did the Fourth Circuit in *UMWA* v. *Patton,* 211 F.2d 742.

Considered alone or with the serious question presented with regard to UMW's involvement in the violence of August 15-16, and in light of the inconsistent application by the three Courts of Appeals which have had occasion to consider the question in labor controversies, the importance of this jurisdictional issue can hardly be denied. UMW submits that a writ of certiorari should be granted to the end that this question may be settled.

Question Four

An important question raised by UMW on its appeal was not answered by the Sixth Circuit.

It will be recalled that the jury's verdict for damages for the loss of employment as a supervisor was based upon a finding of liability under both federal and state law. The District Court set aside finding of liability under Section 303 but nevertheless, upon acceptance of the suggested remittitur, entered judgment on the verdict.

UMW insisted that inasmuch as one of the two theories on which the verdict may have rested was erroneous, the error could be cured only by setting aside the entire verdict and granting a new trial. The Sixth Circuit's affirmance of the judgment, notwithstanding, conflicts with this Court's decision in *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19. It also conflicts with that of the Eighth Circuit in *Local 978, United Brotherhood of Carpenters* v. *Markwell,* 305 F.2d 38

(1962) and *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459 (CA 9, 1964).

Insofar as damages for loss of employment is concerned the verdict was general in nature (See Issue 8 of the verdict form—33a) for it combined the consequences of both federal and state law theories of liability. With the removal of one of the theories of liability it became impossible to determine which theory—or to what extent each theory prompted the verdict on the damage issue. The jury was told the distinction in the measure of damages applicable to the two claims. Thus in explaining the secondary boycott claim the District Court pointed out that "if the object of the activity was unlawful, the fact that only peaceful means were employed does not protect those responsible for liability under the act"; whereas "with regard to the alleged wrongful interference, as distinguished from the alleged secondary boycott, it is the lawfulness of the means rather than the lawfulness of the object or the purpose of the picketing that is controlling" (502a, 506a). Under the charge, therefore, the jury could have considered all of the picketing secondary, and only the events of the first two days as violative of state law, and have assessed its $60,000.000 in damages because of the combined liability.

Because of the positive conflict with the cases cited above and the significance of the Sixth Circuit's decision in this regard in implementing Section 303 of the Act, we believe this question should be reviewed.

CONCLUSION

Petitioner prays that this petition for writ of certiorari be granted and that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals, entered in Case No. 15,624 on April 6, 1965.

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APPENDIX

APPENDIX

APPENDIX A

Nos. 15624-25

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GIBBS, *Plaintiff-Appellee*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*

PAUL GIBBS, *Plaintiff-Appellant*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellee*

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided April 6, 1965.

Before CECIL, O'SULLIVAN and PHILLIPS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Plaintiff Paul Gibbs, appellee in No. 15,624 and cross-appellant in No. 15,625, recovered a $75,000 judgment entered on a jury verdict against defendant United Mine Workers, appellant in No. 15,624 and appellee in No. 15,625. No. 15,624 presents the United Mine Workers' appeal from such judgment. No. 15,625 is Gibbs' cross-appeal from the setting aside of one item of the jury's award of damages. This case is

the latest in a series in which we have considered the collisions between the UMW and those who have sought to operate coal mines in Kentucky and Tennessee without signing UMW contracts.[1] The violence here involved was less spectacular than that described in those decisions. From the evidence, the jury could and did find that by violence and continued picketing the UMW prevented the Grundy Mining Company from opening a coal mine field in the Gray's Creek area of Marion County, Tennessee, and thereby deprived plaintiff Gibbs of his contracts to superintend the mine operation and to truck coal from the mines. Gibbs' complaint charged in substance that the objective of defendant's conduct was to induce and force employees of Grundy Mining Company to refrain from working in the mines, thereby causing Grundy to cease doing business with him as its superintendent and as an independent trucking contractor. His pleadings asserted that defendant's actions constituted a secondary boycott prohibited by Sections 8(b)(4) and 303 of the National Labor Relations and Taft-Hartley Acts, 29 U.S.C.A. §§ 158(b)(4) and 187, and violated the common law of Tennessee as an unlawful interference with his contracts of employment and haulage.

Motions to dismiss and for direction of a verdict were denied. Interrogatories submitted to the jury called for separate answers on each issue in the case, and by its answers the jury found defendant guilty of the charged

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[1] *UMW* v. *Meadow Creek Coal Co.*, 263 F(2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959); *UMW* v. *Osborne Mining Co.*, 279 F(2) 716 (CA 6, 1960), *cert denied*, 364 U.S. 881 (1960); *Gilchrist* v. *UMW*, 290 F(2) 36 (CA 6, 1961), *cert. denied*, 368 U.S. 875 (1961); *Flame Coal Co.* v. *UMW*, 303 F(2) 39 (CA 6, 1962), *cert. denied*, 371 U.S. 891 (1962); *Sunfire Coal Co.* v. *UMW*, 313 F(2) 108 (CA 6, 1963), *cert. denied*, 375 U.S. 924 (1963); *White Oak Co.* v. *UMW*, 318 F(2) 591 (CA 6, 1963), *cert. denied*, 375 U.S. 966 (1964); *Allen* v. *UMW*, 319 F(2) 594 (CA 6, 1963); *Price* v. *UMW*, 336 F(2) 771 (CA 6, 1964), *cert. denied*, 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791).

violations of the Federal Statute and of the common law of Tennessee. The jury found that 1) UMW had struck Grundy, had induced or encouraged its employees to strike, and had threatened, coerced or restrained Grundy; 2) that an object of such activity was to force Grundy to cease doing business with Gibbs as to his trucking and employments contracts; 3) that such activity was not aimed at Grundy in a primary capacity; 4) that Grundy was engaged in commerce or an industry affecting commerce; 5, 6, 7) that UMW was party to a conspiracy to wrongfully interfere with Gibbs' contracts in violation of Tennessee law; 8, 9) that Gibbs suffered $60,000 damages with respect to his employment contract, and $14,500 damages as to the trucking contract; 10, 11) that Gibbs was entitled to recover $100,000 punitive damages. Upon the basis of the foregoing findings, the District Judge made the following rulings in disposing of defendant's motions for judgment n.o.v. or for a new trial:

1) That the loss of Gibbs' hauling contract was caused by a secondary boycott as well as by a common law conspiracy, but that the jury's award of $14,500 damages for such loss must be set aside since as a matter of law his proofs as to loss of profits had no probative value. This latter ruling is the subject of Gibbs' cross-appeal in No. 15,625.

2) That interference with Gibbs' contract of employment as mine superintendent was not a secondary boycott because in his status as an employee he could not be "any other person" vis-a-vis the Grundy Mining Company as the term is used in 29 U.S.C.A. § 158(b)(4)(B). That this follows from *Seeley* v. *Brotherhood of Painters,* 308 F(2) 52, 60 (CA 5, 1962) where the Court, dealing with a discharged employee's reliance on that Section, said

"It is the appellant-plaintiff's contention that the labor organization caused his injury by 'forcing or

requiring *any person* . . . to cease doing business with *any other person* . . .,' that is, by requiring his employers, Wiscombe Southern and Earl Paint Corporation, to discharge the plaintiff. We are cited to no case where the language 'to cease doing business with any other person' as used in this section has the same meaning as to discharge an employee. Literally, it could have that meaning but that would be foreign to the whole purpose of the section which has to do with a secondary boycott ban. No secondary boycott was involved in this case."

3) That even though Gibbs could not rely on the Federal secondary boycott statute to recover for loss of his employment contract, defendant's conduct did permit recovery for such loss under the common law of Tennessee; that because Federal jurisdiction was properly invoked as to Gibbs' claim for loss of his hauling contract it was proper to allow recovery under state law for the loss of his employment contract under the doctrine of *Hurn* v. *Oursler*, 289 U.S. 238, 77 L.Ed. 1148 (1933), and under this Court's decision in *UMW* v. *Meadow Creek Co.*, 263 F(2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959) and cases following *Meadow Creek*.

4) That improper argument by plaintiff's counsel did not vitiate the entire verdict, and should be considered only in appraising its claimed excessiveness.

5) That the $60,000 award for loss of Gibbs' employment contract was excessive by $30,000, the $100,000 award of punitive damages was excessive by $55,000, and that a new trial must be granted unless plaintiff remit such excessive parts of the awards.

The required remittiturs were accepted by plaintiff, and final judgment was entered in total amount of $75,000.

Turning to the factual background of these rulings, plaintiff Paul Gibbs had been engaged in the coal mining industry for many years, presumably as a miner, as a trucker and trucking contractor, and as a mine operator. In 1959 and 1960, two companies, Tennessee Consolidated Coal Company, referred to herein as Tennessee Consolidated, and Tennessee Products and Chemical Corporation, referred to herein as Tennessee Products, owned and were producing coal in the area in question. Gibbs had been working as a trucker and, as lessee of Tennessee Products, as a mine operator under contract with UMW. Tennessee Consolidated had had contracts with UMW, but after unsuccessful negotiations it terminated such contracts in early 1960 and its operations in what was known as the Coal Valley Mine were shut down by a strike. Prior to August, 1960, Tennessee Consolidated organized a subsidiary called Grundy Mining Company for the purpose of commencing operations in its Gray's Creek holdings. It sought to carry on this operation without a UMW contract, and to that end a number of employees were recruited without notice to former Coal Valley Mine workers, members of UMW. Notice of the new operation, however, was communicated in some manner to one John D. Cain, Jr., a representative of the rival Southern Labor Union. Grundy's president contacted plaintiff Gibbs on August 12, 1960 and they made a verbal contract whereby Gibbs was to be superintendent of the work at Gray's Creek at a starting salary of $600 per month and, as an independent operator, was to furnish trucks and haul the coal produced at Gray's Creek for a price of seventy-eight cents per ton.

The Gray's Creek area was within UMW District 19, whose representative there was one George Gilbert. More particularly, Gray's Creek was within the jurisdiction of defendant's Local No. 5881, whose members had worked at the Tennessee Consolidated Coal Valley Mine. The plan to open up Gray's Creek became known and on Sunday, August 14, pursuant to a posted notice and the call of their president, members of Local No. 5881 met to con-

sider the prospective opening. Monday, August 15, several members of Local No. 5881 went to the entrance of the Gray's Creek work site shortly after Paul Gibbs' arrival there in the early morning. Paul Gibbs, John Cain, representative of the Southern Labor Union, and a number of miners hired to work at the Grundy mine were then and there persuaded not to attempt to commence work. There was evidence that such persuasion was aided by the display of firearms. The next day, August 16, Gibbs, Cain and a substantial number of miners who had been employed by Grundy again arrived at the mine site. Again, they were persuaded and induced not to go to work. This time, however, the persuasion was more impressive. A crowd estimated at 75 to 125, including members of Local No. 5881 was on hand, a large number carrying various types of firearms. It will be sufficient to say that by display and pointing of guns, by beating Cain and burning his brief case, and by "escorting" Gibbs and Cain out of the area by a motorcade, the Mine Workers effectively induced Grundy's employees not to go to work and prevented Grundy Mining Company from opening the Gray's Creek mine. This threshold success was thereafter made secure by around-the-clock picketing of the entrance to the mine area. Picketing continued for eight or nine months during which Grundy Mining Company made no further effort to open the mine.

The proofs were sketchy as to defendant's responsibility for the described conduct. It was stipulated that defendant would be liable for action taken by District 19 representative Gilbert in the course of his employment. Gilbert and members of the Local testified that Gilbert neither knew of nor inspired the Sunday meeting or the conduct which followed on Monday and Tuesday. Gilbert testified that he was at a meeting at Middlesboro, Kentucky, on the two days of violence and did not learn of the "spontaneous" action of the Local members until Tuesday. He knew that he was then advised by his superiors to repair to the mine

site and see to it that the pickets behaved thereafter. It is clear that after the initial success of the violence, the fruits thereof were made secure by picketing which was approved by and was under the control of District 19; UMW subsistence payments were made to the picketers as well as to other unemployed mine workers.

In support of his contention that the UMW through its representative Gilbert knew of and probably inspired the Local's conduct, and that he, Gibbs, was personally the primary target of the described activities, Gibbs offered a miscellany of proofs. He testified that "to the best of my knowledge" he saw Gilbert's car at the scene of the events of August 15 or August 16 and that "I'm thinking that I seen Mr. Gilbert drive up there," although Gibbs also stated that "he [Gilbert] didn't play any part that I seen"; that on August 18 he called Gilbert to inquire why he hadn't shown up for an arranged meeting with Gibbs and asked Gilbert what he wanted of Gibbs, and Gilbert replied, "I want you to keep your damn hands off of that Gray's Creek area over there and tell that Southern Labor Union that we don't intend for you to work that mine." Gilbert's attitude toward Gibbs was further portrayed by his statements to another that, "Hell, we can't let that go on," and that "Paul was trying to bring the other union in there, and he [Gilbert] said he ain't going to get by with it." A third witness reported Gilbert as saying, "Paul was trying to bring the Southern Labor Union into the coal fields," and "he said the union wouldn't let him do it," and "they had ways of preventing him from doing it . . . he seemed to think Gibbs was going to have to go," and "he said he had friends in high places that could move him out from the mining business." Further evidence of a purpose to impede Gibbs' continued pursuit of the mining business was furnished by proof that within a week or so after the violence of August 15 or 16, a sack was burned at the mouth of another mine then being operated by Gibbs under a lease with another owner; that the smoke from such a

burning would suffocate workers in the mine if they stayed there long enough, and that the belt on an exhaust fan had been cut several times. There was no proof directly connecting any member of defendant union with this activity.

Some evidence was also offered to show that overt threats or acts of violence were not limited to August 15 and 16. There was proof that on one occasion during the continued picketing of the Gray's Creek mine a visitor to the area observed a rifle against a log at the side of the road near a tent presumably used by the pickets. George Gilbert was among the group of men there present and told the visitor that he could not go down the Pocket Road (near the Gray's Creek mine site) but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was to tell that Gilbert said it was all right to pass. Further evidence of the union's purpose to use force to keep Grundy from operating the mine was provided by proofs that on August 17 or 18, after Gilbert presumably took charge of affairs, a crowd of about 100 to 125 men, some recognized as members of the UMW, gathered near the office of Tennessee Consolidated Coal Company (parent of Grundy Mining) at Palmer, Tennessee. Two officers of the company were harassed by the crowd, some of whom were carrying guns. One of the company officers was manhandled and cursed, and one of the crowd "put a 30-30 carbine on" him as he was getting into his car.

There was evidence that after the events of August 15 and 16, Gibbs was unable to get haulage contracts with various operators, including some for whom he had hauled before. Ultimately he lost some of his trucks. He was also unsuccessful in getting employment as a mine superintendent and in due time leases that he had had with the Tennessee Products & Chemical Company were cancelled. Some time in 1961, Tennessee Consolidated made a contract with the Chicago firm of Allen & Garcia. This firm entered into a contract with the UMW, reopened and oper-

ated the Coal Valley Mine and then in July, 1962, started extensive operations in the Gray's Creek area. It was shown that Gray's Creek was one of the best coal areas in the region and that it had been contemplated that eventually Grundy Mining was to have opened around ten mines there. Grundy soon took over from Allen & Garcia and these plans were substantially accomplished. An official of the Tennessee Consolidated Coal Company testified that after the Gray's Creek area was finally opened, Paul Gibbs was not hired because "Had I hired Mr. Paul Gibbs none of these mines would be open today"; that they would be closed by "the members of the United Mine Workers of the area." The truth of most of the foregoing testimony was challenged by defendant's contrary proofs but resolution of the factual issue made was for the jury, if the case was properly submitted to it. We hold that it was.

1) *Was there evidence of a secondary boycott?*

Appellant UMW contends that the activities described constituted a single primary strike at the premises of Grundy Mining Company to force the hiring of UMW members. The jury, however, found that an object of the defendant's activities was to force the Grundy Mining Company to cease doing business with Gibbs with respect to his contract of employment and his hauling contract. It also found that the union's activity was not a primary strike or primary picketing of Grundy Mining Company. The District Judge set aside the jury's finding of a secondary boycott as to Gibbs' employment contract for the reasons noted above, but sustained its finding of a secondary boycott as to his hauling contract. For the reasons outlined below, we find it unnecessary to determine whether Gibbs ultimately proved the existence of illegal secondary boycott pressure as to either contract. We share the District Judge's view that "the statement in the *Electrical Workers* case [*Local 761, IUE* v. *NLRB*, 366 U.S. 667, 673 (1961)] that 'the distinction between legitimate "primary

activity" and banned "secondary activity" . . . does not present a glaringly bright light' is an effective understatement of the complex and vague wording of the sections of the Act here involved." Certainly here it is difficult to separate the "primary" from the "secondary" and to demonstrate with complete assurance the duality of defendant's objectives. If solution of the problem is a matter of factfinding, the jury's verdict would foreclose further inquiry. But if the answers must be found in a conclusion of law, we are at least satisfied that the federal questions presented by plaintiff's pleadings and proofs were not so "plainly unsubstantial" as to destroy federal jurisdiction. Once District Court jurisdiction had thus attached, the doctrine of *Hurn* v. *Oursler,* 289 U.S. 238, 77 L. Ed. 1148 (1933) permitted the jury to consider whether the same facts claimed to make out a case of secondary boycott did not also prove that a Tennessee common-law tort had been committed by the defendant. The jury's express determination that such a tort had indeed been committed is sufficient to sustain its award of damages, so we find no need to review its determination of the secondary boycott claims.

Our present application of the doctrine of pendent jurisdiction is not novel. In *Hurn* v. *Oursler,* Mr. Justice Sutherland quoted from *Siler* v. *Louisville & N.R.R.,* 213 U.S. 175, 191, 53 L. Ed. 753, 757 (1909), where the Court ruled that once federal question jurisdiction had been acquired the circuit court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or *even if it omitted to decide them at all, but decided the case on local or state questions only.*" (Emphasis supplied.) *UMW* v. *Meadow Creek Coal Co.,* 263 F(2) 52 (CA 6, 1959), *cert. denied,* 359 U.S. 1013 (1959) applied this theory in a case where, as here, the same conduct was claimed to constitute both a secondary boycott and a conspiracy prohibited by Tennessee common law. There the

UMW argued that "the trial court, having in effect held that there was no violation of the federal Act, had no jurisdiction to determine and decide the common law or non-federal cause of action." 263 F(2) 59. We upheld federal jurisdiction to grant relief under state law, however, observing that "the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but merely different grounds to support a single cause of action." 263 F(2) 60. We have continued to apply the rule of pendent jurisdiction, most recently in *Price* v. *UMW,* 336 F(2) 771, 775 (CA 6, 1964), *cert. denied,* 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791), and we are pointed to no persuasive reason for refusing to apply it here.

We are satisfied that plaintiff's evidence clearly made out a case for the jury upon the claim of common-law tort. The jury's answer to the interrogatory in this regard is independent of the secondary boycott finding and is sufficient to sustain the damage award.

2) *Did federal preemption forclose action under the state common law?*

Appellant next argues that even assuming that jurisdiction to determine a state claim for interference with Gibbs' contracts would otherwise exist, federal law has preempted the existence of any such claim. Primary reliance is placed on *Local 20, Teamsters Union* v. *Morton,* 377 U.S. 252 (1964), reversing our decision in *Morton* v. *Local 20, Teamsters Union,* 320 F(2) 505 (CA 6, 1963). We disagree with this argument. The *Morton* case decided only that where a state claim arising from a labor dispute did not rely on violence as part of the charged tortious conduct, it could not be prosecuted independently of, or pendent to, an action under the Federal Act. In *Morton* there was no charge of violence to support the state common-law action. It had been held in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959) that absent violence, state common-law actions for torts arising from conduct arguably protected or prohibited by the Na-

tional Labor Relations Act were preempted by the superior Federal interest. The Supreme Court, however, noted that,

> "we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656. . . ."

In our decision in *Price* v. *United Mine Workers, supra,* we noted the inapplicability of *Morton* where "unlawful acts of force and violence" are involved.

Appellant argues, however, that the UMW did not authorize or know of the violence of August 15 and 16 engaged in by members of its Local, and in any event that there is no way to distinguish damages flowing immediately from the initial violence and those which may have come to Gibbs from the subsequent eight months of picketing which effectively and permanently took away the benefits of his contracts with Grundy Mining Company. Wholly apart from our view that there was circumstantial evidence from which the jury could find that District 19's representative Gilbert had a part in arranging the events of August 15 and 16, we gain the impression that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door.

Whether it be inferred that defendant UMW through its agents had a hand in planning and carrying out the original violence, whether they ratified the violent conduct by

using it to make effective the subsequent so-called peaceful picketing, or whether the violent character continued as a threat throughout the entire picketing, we believe that violence was part of the common-law tort involved, and action therefor was saved from preemption by the rule of *San Diego Bldg. Trades Council* v. *Garmon, supra; United Automobile Workers* v. *Russell, supra; United Construction Workers* v. *Laburnum Corp., supra.*

3) *Improper argument to jury.*

The UMW contends that in all events a new trial should have been awarded because of improper argument to the jury. The District Court conditionally denied the motion for new trial, ruling that,

> ". . . the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial, but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict."

Finding the verdict of compensatory damages for loss of Gibbs' employment contract excessive by $30,000, and the verdict of punitive damages excessive by $55,000, denial of a new trial was conditioned upon acceptance of a remittitur in those amounts. Gibbs accepted the remittitur.

It is now argued that "the District Court clearly found that the argument did prejudice United Mine Workers rights, and that such a finding absolutely requires a new trial." It is the law that where an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error. *Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin,* 283 U.S. 520, 75 L.Ed. 1243 (1931); *Ford Motor Co.* v. *Mahone,* 205 F(2) 267 (CA 4, 1953); *Brabham* v. *Mississippi ex rel. Smith,* 96 F(2) 210

(CA 5, 1938), *cert. denied*, 305 U.S. 636, 83 L. Ed. 409 (1938). We so held in *National Surety Co.* v. *Jean*, 61 F(2) 197 (CA 6, 1932).

Defendant's motion for a new trial charged that the jury's verdict was the result of passion, prejudice or caprice. Though thus challenged to do so, the District Judge did not find that the verdict was so infected. The District Judge found that counsel's argument was improper but we do not believe his statement that it was "not so prejudicial as to warrant a new trial" should be construed as expressing by negative implication a finding that the verdict was the product of passion, prejudice or caprice. The heart of his finding rather is revealed in his statement that the impropriety of the argument was "to be taken into consideration . . . upon the issue of excessiveness of the verdict." The peculiar nature of many of the remarks leads us to conclude that he found the remarks to fall within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits. These remarks are set out in full in the margin to demonstrate why we have come to this conclusion, and why we find ourselves unable to disagree with the court's finding.[2] This finding distinguishes this

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[2] Counsel's remarks include the following:

"Now, what they are doing is what I call legal warfare. They will do what they please, the law doesn't mean (snaps fingers) that to them . . . And as Mr. Kramer told you, if you finally get down to damages, if it is not too much we'll pay it off and do it again. So what. If it is too much we will appeal it and stall a few years. Now, that is the way they work."

"Now, this poverty in the coal field that Mr. Kramer was talking about . . . We've got coal, and we've got men who want to work and mine coal. Now, who is the bugger? The bugger is the United Mine Workers of America, for the simple reason that they are going to pass work on their terms or else. And if a few people starve in the midst, what difference does that make . . ."

". . . in addition even if you awarded $100,000 [plaintiff's requested punitive damages] they would chuckle in their sleeves and walk out of this courtroom and laugh. They will pay off the

case from the cases cited above where the trial judges had found the verdicts to be products of passion, and moves it into the traditional area where a remittitur may be employed to avoid an excessive verdict without resort to a new trial. Thus viewed, we do not find an abuse of discretion in the District Judge's action.

4) *Plaintiff's cross-appeal.*

By his cross-appeal, No. 15,625, plaintiff Gibbs challenges the District Judge's action in setting aside the jury award of $14,500 damages for interference with his contract to haul coal. The District Judge found that there was no probative evidence to support plaintiff's own $14,029.28 estimate of his lost profits and that such estimate was "admittedly based upon carrying loads in excess of the permissible weight limits . . . under the laws of Tennessee." We agree with the District Judge.

Plaintiff's estimate of his lost profits rests on unwarranted assumptions. Using the contract price of seventy-eight cents per ton, he calculated at $27,300 the income from hauling 35,000 tons of coal under a contract for sale to the Redstone Arsenal. Expenses of hauling were then calculated at $13,270.72 *on the assumption* that the five proposed Gray's Creek mines would be producing 10,000

$100,000 and say oh, well, so what. We've got mixed up, it cost us this much, now let's go back and do the same thing again. I give you my word that that is exactly what this Union is counting on. It's the same thing as a fellow that has been caught nine times driving while drunk, and every time he has been brought up they have fined him $1.00. As soon as he got out of the courtroom he would go get him another drink, and that is just exactly what this union is counting on here."

"Now, we believe that all of those elements taken together . . . adequately sustain a compensatory award of $250,000. Now, that sounds like a lot of money, but let me point out to you, look who you are dealing with, too. Don't overlook it. The International Union of the Mine Workers of America . . . Certainly, they want you to be light on them, so they can pay it back and go over there and blow up another mine, or conduct similar activities."

tons per week, although that assumption was based only on plaintiff's "about 30 years experience that I've had in coal mining." Since under this assumption the 35,000 tons of coal could be hauled in three and one-half weeks, the expense figure included wages, repairs, workmen's compensation insurance, truck insurance, payroll taxes, truck tags, telephone, and depreciation costs for only that length of time. Gibbs himself admitted at trial that he could not have delivered the coal in three and one-half weeks if production were at less than 10,000 tons per week. His production estimate is weakened on its face by his failure to attempt reasoned explanation of the figure chosen, by his implied admission that he did not really know what kind of equipment would have been available at the new mine sites, and by his assumption that he could have got the five mines up to a production of 2,000 tons per week each within the space of two weeks. Paul B. Callis, president of Tennessee Consolidated Coal and its subsidiary, Grundy Mining Company, provided testimony weakening the estimate much further by his statement that it had not been decided whether to open five mines at Gray's Creek or only two—"the basic plan was to open two mines to produce approximately 600 tons in each, per day. . . ." Callis also estimated that it would take between six months and one year to get these two mines into full production.

The test which the Tennessee courts would apply in testing the sufficiency of evidence of lost profits under circumstances like those involved here is spelled out in *Anderson-Gregory Co.* v. *Lea,* 51 Tenn. App. 612, 620, 370 SW(2) 934 (1963):

> ". . . when a contract though of some magnitude is informal, and . . . is not within the Statute of Frauds because it is a contract for labor, and nothing has been produced under such a contract but only preparation to produce has been made, . . . only in a clear case, where the proof of profits is devoid of any ele-

ment of speculation and shows all proper means taken to minimize loss should a recovery be allowed for prospective profits."

Plaintiff's only proof of loss was his estimate based on the expenses of three and one-half weeks' operations. Such assumption as to production is too speculative to justify submission of such evidence to the jury. Any possibility of doubt, however, is removed by reviewing the finding of illegality in the proposed operations.

Without going into detail, it is clear that Gibbs' statement of the manner in which he proposed to perform his hauling contract involved violation of the existing laws limiting axle weights. We agree with the District Judge's conclusion that estimates of profits based on proposed violation of state axle-weight laws are of no probative value.

> "Loss of profits may not be considered as an element of damages, where the business from which they would have resulted was, or would have been, conducted in violation of law."

17 C.J. *Damages* § 119. See also 25 C.J.S. *Damages*, § 42b, p. 519; 15 Am. Jur. *Damages* § 157, p. 575; Annot., 52 L.R.A. 33, 66 (1913). The District Judge correctly relied on *Shelley* v. *Hart*, 112 Cal. App. 231, 297 Pac. 82 (1931), for his view that profit estimates which contemplate illegal operations will not support an award, especially where they provide no means of separating the legal from the illegal.

It is impossible to know how Gibbs' estimated profits would have been affected by legal operation instead of illegal. When this infirmity is added to an already uncertain showing, it must be agreed that no proper evidence was offered to support the jury verdict.

Judgment affirmed.

Judgment

(Filed April 6, 1965)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

s/ CARL W. REUSS, *Clerk*

Opinion on Motion to Dismiss

Filed October 26, 1962.

By motion to dismiss the defendant has raised the issue of the jurisdiction of the Court in this case. The complaint purports to allege a cause of action for damages as a result of a secondary boycott arising out of a labor dispute and for damages as a result of an unlawful conspiracy to injure the plaintiff in his employment and otherwise. Jurisdiction purports to be alleged in the complaint upon the grounds of diversity of citizenship and jurisdictional amount and upon the grounds that a federal question exists under 29 U. S. C. A. 187, the secondary boycott provision of the Taft-Hartley Act. The motion to dismiss is based upon two grounds, first that the complaint fails to allege a cause of action under federal law (29 U.S.C.A. 187), and second that the Court is without jurisdiction to try the alleged common law action of tort or conspiracy.

For the exact allegations of the complaint it is of course necessary to refer verbatim to the complaint. By way of summary, however, it appears that the complaint purports to allege that the plaintiff had an employment contract to act as mine superintendent with Grundy Mining Company at a salary of $600 per month, and in addition a truck hauling contract with the same company to haul all coal mined at 78¢ per ton, and that the plaintiff was deprived of the benefits of both the employment contract and the trucking contract by action of the defendant Union in preventing the opening of the Grundy Mining Company mines by mob action and violence. Some lack of clarity in this respect is caused by the omission in the final paragraph of the complaint of any reference to the loss of the trucking contract, the plaintiff's damages there being confined to the interference "with his contract of employment."

In addition to the above rather specific allegations, by amendment to the complaint the plaintiff alleges that the

defendant has threatened, induced and encouraged other "neutral employers," including Tennessee Products and Chemical Company, "not to do business" with the plaintiff.

As indicated above, the complaint purports to allege federal jurisdiction on the grounds of diversity of citizenship and jurisdictional amount. However, the defendant is alleged to be an unincorporated association and for jurisdictional purposes in diversity cases, the unincorporated association can have no citizenship apart from that of its members and proper citizenship of all members must be alleged to exist before diversity will exist. 2 Barron & Holtzoff, Federal Practice and Procedures, sec. 487.

Upon the basis of the allegations of the complaint, the defendant contends that there is no allegation of an actionable secondary boycott under 29 U. S. C. A. 187, in that (1) any alleged loss or damage to the plaintiff was a result of primary action of the Union toward Grundy Mining Company and not a secondary boycott, and that the alleged existence of violence does not in any way affect the existence or non-existence of a secondary boycott, (2) the plaintiff, as a supervisory employee of Grundy Mining Company, was not such a "person" as is referred to in 29 U. S. C. A. 187 as having a cause of action by reason of a secondary boycott, (3) the primary dispute was between the defendant and Grundy Mining Company, and that the plaintiff was acting as a part of the primary employer, and therefore no secondary boycott existed, (4) the alleged actions of the defendant to get others "not to do business" with the plaintiff is unconnected with any loss alleged by the plaintiff, and therefore not an actionable allegation of a secondary boycott. It is further contended by the defendant that, there being no jurisdiction by reason of a federal question, the Court is without jurisdiction of the alleged common law conspiracy or tortious conduct allegations.

On the basis of the allegations in the complaint, the plaintiff asserts more than one interpretation of the complaint. He contends that a secondary boycott under 29

U. S. C. A. 187 is alleged (1) in that the primary dispute was between Gibbs and the Union, and the union activity as to Grundy Mining Company insofar as it affected Gibbs was therefore secondary, (2) in that the primary dispute was between Gibbs and the Union, and the union activity as to employees of Gibbs was therefore secondary, (3) in that union activity and threats toward Tennessee Products and Chemical Company to induce it not to do business with Grundy Mining Company and the plaintiff was a secondary boycott as to both the plaintiff and Grundy Mining Company, (4) in that the Union activity and threats toward "others" to induce them not to do business with the plaintiff was a secondary boycott, (5) in that union activities and threats toward employees of Grundy Mining Company was a secondary boycott as to the plaintiff, and (6) in that union activities and threats toward employees of Southern Labor Union was a secondary boycott as to the plaintiff. It is further contended by the plaintiff that the Court, having jurisdiction over the secondary boycott phase of the case, therefore has ancillary jurisdiction over the common law conspiracy for tortious conduct allegations of the complaint. The Court has difficulty in reading into the complaint all of the various theories advanced by the plaintiff. Part of the difficulty is occasioned by the fact that the complaint is quite specific as to the employment and trucking contracts of the plaintiff with Grundy Mining Company and the union activities toward Grundy Mining Company depriving the plaintiff of the benefits of these contracts, but any other theory of the plaintiff's cause of action must be based upon either (1) a general allegation that "others" were involved, or (2) a specific allegation that Tennessee Products and Chemical Company was involved. No allegation of damage is alleged with respect to the latter two allegations except that they were induced "not to do business" with the plaintiff. The specificness of the complaint in some respects, coupled with its extreme generality in other respects, can be misleading.

Although the Court is unable to read into the complaint all of the theories advanced by the plaintiff with respect to the allegations of a secondary boycott, and, although the Court would be unable to accept each of the plaintiff's theories as constituting a secondary boycott under 29 U. S. C. A. 187, even if they were read into the complaint, nevertheless it does appear to the Court that a secondary boycott may be sufficiently alleged so that the plaintiff should not be put out of court on a motion to dismiss. (This conclusion is fortified by the practice of general pleading permitted in the federal courts.)

First it appears that the allegation that the defendant induced or encouraged Tennessee Products and Chemical Company and "others" "not to do business" with the plaintiff might allege a secondary boycott within the Act. It is pointed out by the defendant that there is no alleged connection between this allegation and the Grundy Mining Company or any damages which the plaintiff sustained. Under Sec. 187 (b) only damages that are a result of the secondary boycott would be recoverable. Although no specific damages are alleged to have resulted from the defendant's having induced or encouraged Tennessee Products and Chemical Company or "others" not to do business with the plaintiff, damages might be inferred from such an allegation. In view of the fact that other specific injuries and damages are alleged in the complaint, and in view of the fact that the plaintiff will be required on the trial to establish by evidence such injury before the case can be submitted to the jury on this theory of a secondary boycott, it is the opinion of the Court that the plaintiff should be required to further amend his complaint to allege what, if any, injury the plaintiff sustained as a result of the matters alleged in paragraph IX of the amended complaint. If no injury or damage can be alleged or proven as a result of the union activity toward Tennessee Products and Chemical Company or "others," then this theory of jurisdiction should be removed from the case without the necessity or expense of a trial.

It further appears to the Court that a secondary boycott may be alleged or inferred from the complaint so as to grant jurisdiction upon the theory that a primary labor dispute existed between the plaintiff and the defendant, and that one object of the Union in its activities toward Grundy Mining Company was unlawfully to induce or persuade Grundy Mining Company to cease doing business with the plaintiff. It is contended by the defendant that the primary dispute alleged is between Grundy Mining Company and the Union. A prohibited secondary boycott is defined at 29 U. S. C. A. 158 (b) (4) as the inducing or encouraging of others if the "object" thereof is to cause them to cease doing business with another. The crux of the matter therefore is as to whether any part of the "object" of the Union in its activities involving Grundy Mining Company was to cause it to cease doing business with the plaintiff. The fact that it may have had other or additional purposes does not relieve it of the charge of a secondary boycott. As stated in the case of *Flame Coal Company* v. *United Mine Workers of America,* 303 F. 2d 39 at 42, "This Union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the recognition of all involved, whether producers, transporters or processors of coal." What the object of the Union may have been in its activities toward Grundy Mining Company may be in dispute and therefore a motion to dismiss should not be sustained upon this.

The defendant relies upon the case of *Seeley* v. *Brotherhood of Painters* (C. A. 5), . . . F. 2d . . ., 51 L. R. R. M. 2042, wherein the Court held that a supervisory employee was not such a "person" as would be entitled to a cause of action under the secondary boycott provision of the Taft-Hartley Act for his discharge by his employer as a result of the Union's inducing or encouraging his employer to do so. Without passing upon the rationale of the *Seeley* case at this time, it is sufficient to point out

in the present case that the injury to the plaintiff may be in his capacity as a trucker and not merely as an employee. It would appear that in his capacity as an independent trucker the plaintiff would be such a "person" as would be entitled to assert rights under the Federal Boycott Law.

Having determined that the defendant's motion to dismiss upon the ground that no federal question is involved should be overruled, it would follow that the defendant's motion to dismiss the common law charge of conspiracy or tort for lack of jurisdiction should likewise be overruled. Under the case of *Hurn* v. *Oursler,* 89 U. S. 238, the Court, having jurisdiction of the federal question, would have ancillary or pendent jurisdiction of the common law allegations.

The defendant's motion to dismiss will therefore be overruled. However, the plaintiff will be required to amend his complaint to allege more specifically any damages claimed to have resulted by reason of the matters alleged in paragraph IX of his complaint as amended, or otherwise this paragraph will be stricken from the complaint. This amendment shall be made within five (5) days.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

Opinion

Filed July 18, 1963.

This case is now before the Court upon the motion of the defendant, United Mine Workers of America, for either a judgment notwithstanding the verdict or for a new trial. Upon trial of the case the jury found in response to special issues that the defendant, United Mine Workers of America, hereinafter referred to as "UMW", had violated the so-called secondary boycott provisions

of the Taft-Hartley Act (29 U. S. C. 187) and had committed the tort of unlawful interference with the plaintiff's contract rights, and awarded the plaintiff compensatory and punitive damages in the total sum of $174,500. Some of the background to this lawsuit is undisputed in the record and may be stated as follows. Tennessee Consolidated Coal Company, hereinafter referred to as "Consolidated", owns extensive coal lands in the Southeastern Tennessee Coal Fields and over a period of many years has engaged both directly in the mining of coal and in the leasing of coal lands to others to mine. Prior to March 15, 1960, Consolidated had operated a mine in Marion County, Tennessee, known as the Coal Valley Mine, this mine being operated under a collective bargaining agreement with the UMW. The Coal Valley Mine was closed down by a strike upon that date when negotiation of a new collective bargaining contract failed after termination of the former contract by Consolidated in accordance with its terms.

In August of 1960 Grundy Mining Company, herein referred to as "Grundy", a wholly owned subsidiary of Consolidated, took steps to open new mines in the Gray's Creek Area of Marion County, Tennessee, within the general vicinity of the Coal Valley Mine and upon Consolidated coal lands. In preparation for opening these new mines Grundy agreed to employ Paul Gibbs, the plaintiff herein, as mine superintendent at a salary of $600 per month. At the same time Gibbs asked for the contract to haul the coal from the new mines at a price of 78¢ per ton and this was also agreed upon by the parties. Both the employment contract and the trucking contract were for an indefinite period. Gibbs' background was that of a coal operator and trucker.

Grundy proposed to open the new mine in the Gray's Creek Area without a contract with the UMW. Upon Monday, August 16, 1960, the first day work was scheduled to begin, Gibbs and a few others appeared for work,

but picketing and a show of force took place by UMW members who were former employees of the Coal Valley Mine and no work was done. Violence or threatened violence continued the next day and all efforts by Grundy to open the mines in the Gray's Creek Area appear to have ceased after the second or third day. The picketing continued from August, 1960, until the following May, 1961. Gibbs drew one check of $300 under his salary agreement. He never got to haul any coal under his trucking contract with Grundy. In May of 1961 Consolidated contracted with a firm by the name of Allen & Garcia, an engineering firm, as operators to reopen the Coal Valley Mine and this was done by Allen & Garcia under a collective bargaining agreement with UMW. This lawsuit was begun in August of 1961, but to carry events down to the time of the trial, it appears that the Coal Valley Mine continued in operation by Allen & Garcia under contract with the UMW until it was closed in the early summer of 1962 when a fault in the coal seam was struck. Thereupon Allen & Garcia opened a new mine in the Gray's Creek Area and moved the Coal Valley equipment and personnel to the new mine. In September of 1962 Allen & Garcia terminated its operating contract with Consolidated and gave notice of termination of the UMW contract. Grundy thereupon took over the Gray's Creek operation, and in addition opened some seven or eight hand loading mines in the area, but did not further employ Gibbs in any of these operations.

This lawsuit was begun upon August 23, 1961, when the plaintiff, Gibbs, filed suit herein against the UMW seeking to recover compensatory and punitive damages and alleging that UMW had violated Section 303 of the Taft-Hartley Act (29 U. S. C. 187) and was guilty of a common law conspiracy aimed at him. The case was tried by the plaintiff upon the theory that the UMW had directed its unlawful activities toward various coal operators with whom Gibbs had business dealings or with

whom he anticipated doing business, including Grundy, Consolidated, Tennessee Products and Chemical Company, and one George Ramsey, in an alleged effort to cause them to cease doing business with him or to refuse to do business with him. At the conclusion of all of the evidence the Court concluded that the evidence was insufficient to warrant submitting to the jury the issues with reference to any losses sustained by the plaintiff by reason of any UMW activities directed toward inducing Consolidated, Tennessee Products & Chemical Company and George Ramsey to either cease or refuse to do business with Gibbs, but rather that the case should be submitted to the jury only with reference to any compensatory or punitive damages the plaintiff might be entitled to recover by reason of UMW activities alleged to have been directed toward having Grundy terminate its employment contract and its trucking contract with Gibbs.

The case was submitted to the jury upon a number of special isues. The jury found all issues in favor of Gibbs and against the UMW and awarded compensatory damages to Gibbs in the sum of $60,000 for termination of his employment contract with Grundy, and in the sum of $14,500 for termination of his trucking contract with Grundy and awarded punitive damages to Gibbs in the sum of $100,000, for a total award of $174,500 to the plaintiff.

A number of grounds in the defendant's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, are directed toward alleged errors in the jury verdict in finding that the defendant violated the secondary boycott provisions of the Labor-Management Relations Act. It is the contention of the defendant in this regard that under the evidence in this case there either was no secondary boycott as a matter of law, or that the evidence preponderates against such a finding. It is the contention of the defendant that no violation

by it of 29 U. S. C. 187 (Sec. 303 of the Labor-Management Relations Act as amended) was shown in the evidence as (1) there was no evidence that the defendant was responsible for the activity alleged to constitute a secondary boycott, and (2) any loss occasioned the plaintiff was at most the result of primary union activity and not the result of any secondary activity for the reason that (a) such activity was limited to the premises of Grundy Mining Company, the employer with whom the dispute existed, (b) the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs, (c) the plaintiff, as mine superintendent for Grundy, was not such "other" or "neutral" person as to be the object of a proscribed secondary boycott, but rather was a part of Grundy, the primary employer.

Considering the defendant's contentions in the order stated above, the Court is of the opinion that there was sufficient evidence in the record to warrant submitting to the jury the issue of the defendant's responsibility for activity alleged to constitute secondary boycott. By stipulation UMW admits its responsibility for acts of its field representative, George Gilbert, performed in the scope of his employment. Without now determining whether the evidence was sufficient to permit a jury finding that UMW was responsible for the activities and violence testified to as having occurred in the Gray's Creek Area upon August 15 and 16, 1960, it appears undisputed that the UMW became aware of such activities by the 16th. There is evidence upon which the jury could find that thereafter Gilbert participated in and supported, if not controlled, the picketing that occurred. The witness, Swope, testified that George Gilbert gave instructions to the pickets to permit Swope to pass through the picket lines. The witnesses, Gibbs, Campbell, and Higgins, each testified to conversations with George Gilbert during the course of the picketing indicating his

support of the picketing and his direction of union activities toward the end of prevenitng Gibbs from working for Grundy or from bringing into the Gray's Creek Area the Southern Labor Union, a competitive union. Whether Gilbert or the UMW was or was not responsible for any violence or threats of violence that may have occurred either before or after August 16 is not controlling on the issue of secondary boycott, as it is the object of the union activity that constitutes the essence of the unfair labor practice involved in a proscribed secondary boycott. As stated in the case of *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 at 672:

> ". . . Violence on the picket line is not material (and) . . . would not in itself bring the complained of conduct into conflict with Section 8(b)(4). It is the object of union encouragement that is proscribed . . . rather than the means adopted to make it felt."

The UMW next contends that Gibbs' loss of employment and loss of his trucking contract would at most be the result of primary union activity directed toward Grundy, and therefore not actionable under 29 U. S. C. 187, as the union activity was limited to the premises of Grundy. In support of its position in this regard, the defendant relies principally upon the case of *Electrical Workers* v. *Labor Board* (cited as *Local 761* v. *NLRB)*, 366 U. S. 667, which it is contended holds that picketing at the situs of the primary employer does not violate the secondary boycott provisions of Sec. 8 (b) (4) (A) of the National Labor Relations Act [29 U. S. C. 158 (b) (4) (A)]. It is believed by the Court that the holding in the *Electrical Workers* case is not controlling under the facts and circumstances of the principal case. That case involved a review of a National Labor Relations Board decision that held that picketing of the primary employer, General Electric Company, that extended to

a gate not used by employees of the primary employer, but which was rather used only by employees of independent contractors of General Electric Company, was an unfair labor practice under Sec. 8 (b) (4) (A) in a labor dispute between the union and General Electric Company. The Supreme Court affirmed this holding with the proviso that should it be made to appear that the independent contractors' employees performed work to a substantial extent that contributed to the normal operations of General Electric Company, then the picketing of such employees' gate would not constitute an unfair labor practice. In distinguishing the case it must be remembered that a Board decision and not a jury verdict was there involved and the appellate review is not the same. Even if the *Electrical Workers* opinion were, as contended by UMW, authority for the proposition that picketing at the situs of the primary employer could not constitute a Sec. 8 (a) (4) (B) unfair labor practice though it had a secondary effect upon others, this is not decisive of the issues in the principal case. No issue was involved in the *Electrical Workers* case but that General Electric was the object of the primary activity, whereas whether Grundy was the object of primary or secondary activity or both is one of the disputed issues in the principal case. No issue was there involved but that all union activity occurred on the premises of General Electric Company, the primary employer, whereas the activity complained of in the principal case occurred at various places at various times. The statement in the *Electrical Workers* case that "the distinction between legitimate 'primary activity' and banned 'secondary activity' does not present a glaringly bright light" is an effective understatement of the complex and vague wording of the sections of the Act here involved. The Court there likewise pointed out that the meaning of the secondary boycott provisions of the Act must be worked out with reference to the facts of a particular case rather

than in the statement of all-inclusive principles when it stated:

> "The nature of the problem, as revealed by unfolded variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."

While the situs of the union activity would be evidence which the Jury might properly consider in determining the object of such activity, where the object is in issue, the situs is not self controlling in establishing a secondary boycott.

The essence of the statutory language pertinent to the issues of this lawsuit, when stripped of all non-applicable phrases and when stripped of references to interstate commerce, is as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .
>
> "(4) (i) to engage in or to induce or encourage any individual . . . to engage in, a strike or refusal in the course of his employment . . . to perform any services or (ii) to threaten, coerce, or restrain any person . . ., where in either case an object thereof is
>
> (B) forcing or requiring any person to . . . cease doing business with any other person . . . provided that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

When viewed in its essence, it is apparent that the specified union activity becomes unlawful and therefore actionable as a secondary boycott, when an *object* of such union activity is to force or require any person to cease doing business with any other person, provided that the

activity is not a primary strike or primary picketing, having only an incidental or secondary effect upon the other person. In this regard it is necessary to distinguish between primary activity having a secondary effect upon others, which is not actionable,[1] and activities directed toward one person and having as an object the causing of that person to cease doing business with another person with whom a primary labor dispute exists, which is actionable.[2]

The UMW next contends that under the facts of the principal case any union activity would in no event be actionable under 29 U. S. C. 187, as the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs. As stated above in discussing the issue of UMW's responsibility for any activity, the witnesses, Gibbs, Campbell, and Higgins, each testified to statements having been made by George Gilbert that would indicate that his purpose or object was to prevent Gibbs from working for Grundy or from bringing into the Gray's Creek Area the Southern Labor Union. This evidence would support the jury verdict when it found that an

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[1] *Electrical Workers* v. *Labor Board*, 366 U. S. 667 (1961); *Seafarers International Union* v. *NLRB*, 265 F. 2d 585 (D. C. Cir., 1959).

[2] *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C. C. A. 6, 1960) cert. denied 364 U. S. 881; *Gilchrest* v. *United Mine Workers of America*, 290 F. 2d 36 (C. C. A. 6, 1961) cert. denied 368 U. S. 875; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F. 2d 39 (C. C. A. 6, 1962); *Sunfire Coal Co.* v. *United Mine Workers of America*, 313 F. 2d 108 (C. C. A. 6, 1963); *White Oak Coal Co., Inc.* v. *United Mine Workers of America* (Opinion May 24, 1963), ... F. 2d .... (C. C. A. 6, 1963); *Joe R. Allen et al.* v. *United Mine Workers of America* (Opinion June 26, 1963), ... F. 2d .... (C. C. A. 6, 1963).

object of the union activity was to cause Grundy to cease doing business with Gibbs with respect to both his employment contract and his trucking contract. The fact that the union may have had some object or objects other than and in addition to causing Grundy to cease doing business with Gibbs would not prevent the activity from constituting a secondary boycott insofar as Gibbs was concerned, and therefore actionable by him as such. As stated in the case of *Flame Coal Co.* v. *UMW*, 303 F. 2d 39 (C. C. A. 6, 1962).

> "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters, or processers of coal. *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716, 723."

Finally, upon the issue of secondary boycott it is contended by the defendant that any union activity here involved would in no event constitute an actionable secondary boycott as to Gibbs for the reason that, as mine superintendent for Grundy, he was not such an "other person" within the contemplation of Sec. 8 (b) (4) (B) as to be the object or victim of a proscribed secondary boycott, but rather he was a part of Grundy, the primary employer. The relationship of Gibbs to Grundy, namely that he was hired as mine superintendent for Grundy and as a contract coal hauler, is undisputed in the record. Therefore, whether he or is not such "other person", the ceasing of business with whom may constitute an actionable secondary boycott, is a question of law.

If the language of the statute is to be literally interpreted, then Gibbs is clearly an "other person" from Grundy, as would be any officer or employee of Grundy.

However, as stated in *Electrical Workers* v. *Labor Board*, 366 U. S. 667:

> "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity."

Likewise, as noted in *Seafarers International Union* v. *NLRB* (1959), 265 F. 2d 585, when read literally, the Act would outlaw picketing at the primary employer's premises so that the language must be construed in the light Congressional intent and in the light of the proviso that nothing in the Act shall be construed to make any primary strike or primary picketing unlawful.

In support of its contention that Gibbs is not such "other persor" from Grundy as to be the object of a secondary boycott for activities directed at Grundy, the defendant relies principally upon the case of *Seeley* v. *Brotherhood of Painters*, 308 F. 2d 52 (5 C. C. A., 1962). In that case the plaintiff, in one of several counts, alleged that he had a cause of action against the defendant union under 29 U. S. C. 187, in that the defendant caused the plaintiff's employer to discharge him. The Court, in holding that the count failed to state a cause of action, stated that discharging an employee did not constitute "ceasing to do business with any other person," stating further, "We do not think the relation of employer and employee, including one employed as a supervisor, is that of 'any other person' within Section 158 (b) (4)." The Court reached this conclusion on the ground that "no secondary boycott was involved in this case," which is rather unsatisfactory reasoning in that it begs the question.

The defendant relies upon other authority as requiring that the plaintiff be a "neutral" before he is entitled

to the benefit of the statutory secondary boycott action.[3] That this is not an accurate statement of law is apparent when it is recalled that 29 U. S. C. 187 (b) provides that "*whoever* shall be injured" by a secondary boycott may recover, including the employer with whom the primary dispute exists.[4] While the word "neutral" may be useful in identifying a case of secondary boycott in a clear and classical case of secondary boycott, little help is needed in identifying a clear and classical secondary boycott. The word "neutral" can be misleading in other situations, as for example where the union strikes on all fronts at once, as was the case in *Flame Coal Co.* v. *United Mine Workers of America,* 303 F. 2d 39 (C. C. A. 6, 1962), where the Court held that such union activity did not escape the charge of secondary boycott. If two employers each simultaneously has a dispute with the same union, they may be neutral as to each other's dispute, but they are in no sense neutral as to the union.

While a correct result may have been reached in each of the foregoing cases relied upon by the defendant as authority for excluding an employee or supervisor from the meaning of "other person" in Sec. 8 (b) (4) (B), the reasons given for reaching such conclusion are often unsatisfactory. Reference to the full wording of the section will more properly reveal the meaning that must necessarily be placed upon the words "other person". When it is noted that the proviso expressly excludes primary strikes and primary picketing, it is apparent that employees and supervisors of any struck or picketed primary employer who may lose their employment are

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[3] *Truck Drivers and H. Local 728* v. *Empire State Express,* 293 F. 2d 414 (5 C. C. A. 1961) cert. denied 368 U. S. 931 (1961); *Building Service Employees* v. *NLRB,* 313 F. 2d 880 (D. C. Cir., 1963); *International Brotherhood of Electrical Workers* v. *NLRB,* 181 F. 2d 34 (C. C. A. 2, 1950).

[4] See cases cited in Footnote No. 2, *supra.*

not within the meaning of "other persons" and would have no statutory action for any loss so occasioned.

It is apparent from the foregoing that Gibbs, in his capacity as mine superintendent for Grundy, would not be an "other person" as those words are used in the statute. Although, as found by the jury, an object of the picketing of Grundy was to cause it to cease employment of Gibbs, and Grundy may have been "neutral" or secondary to the dispute between UMW and Gibbs, there also clearly existed a primary dispute between UMW and Grundy. It follows that the verdict of the jury awarding damages to Gibbs upon his statutory claim for loss of employment must be set aside.

It does not necessarily follow, however that, even though Gibbs in his capacity as a mine superintendent and in his claim for loss of employment is not an "other person" from Grundy, that he is therefore in his capacity as a coal trucker and in his claim for loss of the trucking contract not an "other person" from Grundy. The evidence is undisputed that Gibbs was an independent trucker engaged in this business with and for persons and companies other than Grundy. He did not work only for Grundy in this respect. It would therefore appear that in his capacity as an independent trucker he would be an "other person" from Grundy and would be entitled to a statutory action under the secondary boycott law upon this claim.

Having determined that the jury verdict should be sustained as to the statutory cause of action for loss by Gibbs of his trucking contract, it would follow that the defendant's contention that the Court was without jurisdiction of the common law conspiracy action must fail.[5] Even though the federal statutory action should fail both

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[5] *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F. 2d 39 (C. C. A. 6, 1962).

upon the employment and the trucking claim, it cannot be said that the federal question was plainly wanting in substance. Under these circumstances, in accordance with the case of *Hurn* v. *Oursler,* 289 U. S. 238, the Court would retain jurisdiction to dispose of the non-federal common law claim.

Another series of grounds in the defendant's motion for a judgment n.o.v. or a new trial are directed toward alleged errors in the jury verdict in finding that the defendant conspired to wrongfully interfere with the plaintiff's employment contract and coal hauling contract with Grundy. It is the contention of the defendant in this regard that the evidence fails to support the jury verdict, particularly in view of the legal principles that (a) the evidence must be clear and convincing for a labor union to be held responsible in a federal court action, in view of Section 6 of the Norris-Laguardia Act; (b) a union is under no legal obligation to disavow unlawful acts of its members; (c) welfare assistance given members, including pickets, by the union does not constitute ratification of any unlawful conduct by such members or pickets; and (d) federal law has preempted the field of non-violent picketing so that no verdict could be awarded upon a state common law conspiracy charge not based on violence. The jury was correctly charged upon all of these matters. The Court is of the opinion that there is evidence in the record, when the testimony is viewed as a whole, to support the verdict of the jury in this respect. The contention that 29 U. S. C. 187 and the other provisions of the National Labor-Management Relations Act preempted the field of labor controversy or precluded any common law action of conspiracy has been decided against the UMW in several cases in this circuit, the most recent being the case of *White Oak Coal Co.* v. *United Mine Workers of America,* . . . F. 2d . . . (C. C. A. 6, decided May 24, 1963). Moreover, there was evidence of violence, threats of violence, and mass picket-

ing, any of which was such unlawful conduct as to support a verdict based upon common law conspiracy.

A further series of errors alleged by the defendant are directed to the Court's charge to the jury. It is the contention of the defendant that the Court was in error in declining a special request of the defendant relating to a requirement that a neutral exist before an actionable secondary boycott would exist. The Court has hereinabove dealt with the possible misleading nature of the word "neutral" when used in defining a Sec. 8 (b) (4) unfair labor practice. It is believed that the charge as given correctly defined the statutory claim. Moreover, the action of the Court in setting aside the jury verdict on the statutory claim of interference with the plaintiff's employment contract would render this ground of the defendant's motion moot. The other alleged errors in the charge were matters not raised at the time of the trial as required by Rule 51, Federal Rules of Civil Procedure. It is believed that in any event no error was committed in the matters complained of.

A further ground for new trial relied upon by the defendant is the alleged improper argument of the plaintiff's counsel in his closing argument. Among other remarks, counsel for the plaintiff accused the defendant of not caring a snap of the fingers for the law and of attempts to bludgeon or starve his client out of the lawsuit. The Court is of the opinion that the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial, but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict.

Further grounds relied upon by defendant in its motion relate to the alleged lack of evidence on the issue of

damage and the alleged excessiveness of the verdict in this respect. The only evidence in the record that might support any recovery of damage with reference to the loss of the plaintiff's trucking contract was the plaintiff's own estimate of the profit he would have made on the contract, as set forth in Plaintiff's Exhibit No. 34, in the amount of $14,029. His actual experience in the coal trucking business reflected substantial losses, rather than profits, for preceding years. Not only is there an absence of credible evidence to support the estimate but the estimate is admittedly based upon carrying loads substantially in excess of the permissible weight limits applicable to the plaintiff's trucks under the laws of Tennessee. The issue here is not the validity or invalidity of the coal hauling contract, or the right of a third party, the UMW, to assert its invalidity, as apparently argued in the plaintiff's brief. The issue here is as to the probative value of the evidence of the loss of prospective profits when based upon prospective violation of truck weight laws. The Court is of the opinion that such evidence has no probative value.[6] Under these circumstances the record is devoid of any evidence upon which a jury might return a verdict awarding any damages for loss by the plaintiff of his trucking contract and the defendant's motion for a directed verdict upon this issue made at the conclusion of the evidence should have been sustained.

With respect to the verdict awarding damages unto the plaintiff for loss of his employment contract, the Court is of the opinion that there is evidence in the record upon which a verdict might be sustained. However, without here reviewing the evidence relating to damages sustained by reason of loss of the employment contract, other than to note that the employment con-

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[6] *Shelley* v. *Hart*, 297 P. 82 (Calif., 1931). See also 25 C. J. S., Damages, Sec. 42 (B) and 15 Am. Jur., Damages, Sec. 158, 159.

tract was terminable at will by either party, the Court is of the opinion that the verdict of the jury upon this issue is clearly excessive to the extent of $30,000. Likewise in reviewing the evidence and reflecting upon the argument of the plaintiff's counsel to the jury, the Court is of the opinion that the jury verdict upon the issue of punitive damages is clearly excessive to the extent of $55,000. A remittitur in the sum of $30,000 upon the issue of loss of the plaintiff's employment contract and in the sum of $55,000 upon the issue of punitive damages is therefore suggested, or otherwise a new trial will be ordered.

The Court has reviewed Grounds 10, 11, 12, and 13 of the defendant's motion relating to the admissibility of various items of evidence upon the trial, and is of the opinion that these grounds are without merit and should be overruled.

It therefore results that the verdict of the jury in favor of the plaintiff on the issue of loss of the plaintiff's employment contract by reason of a statutory secondary boycott will be set aside. The verdict of the jury awarding damages unto the plaintiff on the issue of loss of the plaintiff's trucking contract by reason of both a statutory secondary boycott and a common law conspiracy will be set aside. The defendant's motion for a judgment n.o.v. upon these issues should be sustained. Unless the plaintiff shall agree to accept a remittitur of $30,000 in the jury verdict on the issue of damages by reason of loss of the plaintiff's employment contract as a result of a common law conspiracy and to accept a remittitur of $55,000 in the jury verdict on the issue of punitive damages, the Court believes that these issues should be submitted to another jury and a new trial will be ordered.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

APPENDIX B

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act)

§106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA)

§158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

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(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

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(b) It shall be an unfair labor practice for a labor organization or its agents—

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(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

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(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

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§ 187. Boycotts and Other Unlawful Combinations; Right to Sue; Jurisdiction; Limitations; Damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title. As amended Sept. 14, 1959, Pub. L. 86-257, Title VII, § 704(e), 73 Stat. 545.

(b) Whoever shall be injured in his business or property by reason or [1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158.

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[1] So in original. Probably should read "of."